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No. 1112

# In the Supreme Court of the United States

## October Term, 1965

JOSEPH SIMMONS, JR., DAVID SIMMONS, CLARENCE TOUGAW and VIOLA TOUGAW, and those similarly situated, *Appellants*,

v.

CHIEF EAGLE SEELATSEE, Individually and as Chairman of the Yakima Tribal Council, and the YAKIMA TRIBAL COUNCIL OF THE CONFEDERATED BANDS AND TRIBES OF THE YAKIMA NATION, *Appellees*,

UNITED STATES OF AMERICA, *Intervenor*.

**On Appeal From the United States District Court For The Eastern District of Washington, Southern Division**

# MOTION TO DISMISS AND/OR AFFIRM

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v.

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*Appellees,*

UNITED STATES OF AMERICA,
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**On Appeal From the United States District Court For The Eastern District of Washington, Southern Division**

## MOTION TO DISMISS AND/OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the grounds that the appeal is not within the jurisdiction of this court and/or that the final judgment and decree of the District Court be affirmed on the grounds that the question is so unsubstantial as not to warrant further argument, and that the decision of the District Court is correct.

## STATEMENT

This is a direct appeal from the final judgment and decree entered on December 6, 1965, by a District Court of three judges dismissing the appellants' complaint which sought to declare unconstitutional Sec. 7 of the Act of August 9, 1946, c. 933, 60 Stat. 968, 25 U.S.C. § 607, Appendix A, page 15, Jurisdictional Statement, and to enjoin the appellee, Tribal Council, and its Chairman, from taking any action which would keep appellants from being able to qualify under said section to inherit Yakima Indian trust property. (Hereafter, for continuity, the section attacked will be referred to as Sec. 7.)

Appellants brought this action in the United States District Court for the Eastern District of Washington, alleging that said Sec. 7 is unconstitutional and void, and complaining that the Secretary of Interior, through his Examiner of Inheritance, rejected appellants' claim of heirship. Appellees appeared by motion to dismiss for failure to state a claim upon which relief can be granted, and upon various other grounds including assertions that the court was without jurisdiction. The United States, acting through the Attorney General, moved the court for leave to intervene and such leave was granted. The petition in intervention of the United States adopted the position of the appellees taken in their motion to dismiss, and in particular stated that the court lacked jurisdiction, and that said Sec. 7 of the Act is constitutional.

The three judge District Court, after argument on the motion to dismiss, held that the complaint failed to state a claim, that it could not be amended to state a claim since appllants are without rights in the premises, and dismissed the complaint and action with prejudice.

## ARGUMENT

### A. This Appeal Is Not Within the Jurisdiction Of This Court.

The Secretary of the Interior, not this court, has exclusive jurisdiction regarding the descent and distribution of the trust estate involved in this case, and his findings are final and conclusive.

> Sec. 1, Act of June 25, 1910, 36 Stat. 855; amended March 3, 1928, c. 122, 45 Stat. 161; amended Apr. 30, 1934, c. 169, 48 Stat. 687; 25 U.S.C. § 372, Appendix D, pages 19–21, Jurisdictional Statement.
>
> Title 25, Code of Federal Regulations, Part 15, Appendix G, pages 22-23, Jurisdictional Statement.

*Hallowell v. Commons*, 239 U.S. 506 (1916).

*McKay v. Kalyton*, 204 U.S. 458 (1907).

Appellants have not pursued the administrative prerequisite even to the point of a Secretarial determination that they are the natural heirs of the decedent allottee. In the absence of such administrative determination, the appellants had and have no standing to bring or continue this action.

There is no jurisdiction over the person of appellees in this action, as the actions appellants seek to enjoin

are official acts of a Tribe or Nation that is not amenable to suit.

*United States v. U. S. Fidelity & Guaranty Company*, 309 U.S. 506 (1940).

*Turner v. United States*, 248 U.S. 354 (1919);

The cases cited in support of jurisdiction in the Jurisdictional Statement are not controlling. *Radio Corp. v. United States*, 341 U.S. 412 (1951), is a decision regarding an administrative order not a Federal statute. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962), and *Florida Lime Growers v. Jacobsen*, 362 U.S., 73 (1960), are cases involving state statutes, not a Federal statute.

**B. The Question Involved Is so Unsubstantial as Not to Warrant Further Argument, and the Decision of the District Court Is Correct.**

The final judgment and decree of the District Court should be affirmed, as the question raised by appellants is so unsubstantial as not to warrant further argument, and further the decision of the District Court is clearly correct. Appellants' theory in the District Court was that since the recipients of certain trust estates must have a minimum quantum of Yakima Indian blood that said Sec. 7 is unconstitutional because the classification was based on race. When Congress deals with Indians and defines what constitutes an Indian it must and does refer to quantum of Indian blood. To declare this classification unconstitutional would be to destroy completely the plenary power that Congress has and exer-

cises under its legislative powers specified in the United States Constitution (U. S. Const., Art. I, Sec. 8, Cl. 2). Appellants have apparently abandoned that theory and now argue that this case "is important because public and private agencies have decried the law's unfairness and because it has deprived several hundred Indian children of their inheritance, and because the Secretary of Interior is continuing to enforce it." (J.S. p. 4). Selective excerpts from Congressional hearings are then set forth to substantiate this position. These arguments are better left to Congress where they, and contraverting arguments, have been made. The question appellants also raise is that "an allotment such as we have here, for all practical purposes, is the vesting in the allottee of a tenancy in fee simple absolute, except that he cannot alienate it without the Secretary of the Interior's approval." (J.S., p. 7). This demonstrates a basic misunderstanding of the allotment system. Appellants beg the question by their analogy to a tenancy in fee simple. Indian lands, reserved at the time of the Treaty, are held in trust by the government for the benefit of the Tribe. Individual allotments granted from this Tribal property were made pursuant to the General Allotment Act (Sec. 1 of the Act of February 8, 1887, c. 119, 24 Stat. 388, as amended, 25 U.S.C. § 331, Appendix B, page 16, Jurisdictional Statement). They were made under Congress' power to determine who among the Tribe should enjoy the benefits of this Tribal property. Trust or restricted pat-

ents give one Tribal member dominion over this allotment to the exclusion of all others, subject to the restrictions imposed under the plenary power of Congress. As was acknowledged by the District Court, appellants' position would, if pressed to a logical conclusion, render the very existence of the original trust patent void ab initio because it was based on race and blood quantum. Appellants rely on said patent to sustain their interest in the res. If appellants' position were upheld it would follow that any trust established for the benefit of any Indian Nation or Indian would be unconstitutional because of the necessity of defining the cestui on the basis of blood quantum. To preserve the trust res for the benefit of those for whom the trust was created, Congress has determined that to inherit beneficial interests in the lands originally reserved by the Yakima Tribe and held in trust by the United States, one must be at least one-quarter blood Yakima Indian. Appellants' argument is that Congress was wrong, and the right to determine the benefits should be based on relationship to the original allottee. This argument, again, is better left to Congress. The trial court correctly upheld the constitutionality of Sec. 7, which determined who should have the benefits of Yakima Indian Trust Land. The District Court correctly held that Congress had the plenary power to determine the right of these beneficial interests. That Congress has the plenary power to deal with trust interests has been clearly established by this court. There are no

contrary decisions and this rule has been firmly established in the following cases:

*Tiger v. Western Investment Company*, 221 U.S. 286 (1911);

*United States v. First National Bank of Detroit*, 234 U.S. 245 (1914);

*United States v. Ferguson*, 247 U.S. 175 (1918);

*Hallowell v. Commons*, 239 U.S. 506 (1916);

*McKay v. Kalyton*, 204 U.S. 458 (1907);

*United States v. Jackson*, 280 U.S. 183 (1930);

*Sizemore v. Brady*, 235 U.S. 441 (1914);

*United States v. Rowell*, 243 U.S. 464 (1917).

*Shoshone Tribe v. United States*, 299 U.S. 476 (1937), cited in the Jurisdictional Statement, is not controlling. To constitute "an appropriation of property within the meaning of the Fifth Amendment," it should appear that the aggrieved part has a property right. The Shoshone Tribe did. The Appellants do not.

*United States v. Creek Nation*, 295 U.S. 103 (1935), cited in the Jurisdictional Statement is not controlling. The Creek Nation held the property involved in fee simple. Appellants do not.

*Korematsu v. United States*, 323 U.S. 214 (1944), cited in the Jurisdictional Statement is not controlling, for as observed by appellants this case did not involve property rights.

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), cited in the Jurisdictional Statement is not controlling. Again

the moving parties had a vested interest in the property. Appellants do not.

*Regan v. Farmer's Loan & Trust Company*, 154 U.S. 362 (1894), cited in the Jurisdictional Statement is not controlling. There was a vested property right involved. Here there is none.

*Bolling v. Sharpe*, 347 U.S. 497 (1954), cited in the Jurisdictional Statement is not controlling. As the District Court points out, segregation of a public school by race has no relationship to Congress' power to determine who is and who is not an Indian, and to further determine rights flowing from said determination.

## CONCLUSION

We respectfully submit, therefore, that this appeal is not within the jurisdiction of this court and should be dismissed, and/or that the final judgment and decree of the District Court be affirmed on the grounds that the question involved is so unsubstantial as not to warrant further argument, and that the decision of the District Court is correct.

Respectfully submitted,
JAMES B. HOVIS
*Counsel for Appellees*

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